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Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. New York State's plan, submitted to and approved by the Commissioner of Education, contains detailed provisions for education of the deaf, and the school district is in full compliance with that plan.

Respondents and their amici contend that the school district did not raise the state plan argument in the lower courts and should be precluded from raising it in this Court (brief of National Association of the Deaf et al., pp. 25-28; brief of the United States, pp. 9-10). The United States also inaccurately contends that the petitioners now raise two arguments developed after the filing of the petition for the writ of certiorari, in reliance upon the decision in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). The challenged arguments are that the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq., created no substantive rights against

the states for free appropriate public education; and that, in accepting federal aid, the states did not consent to a review procedure whereby the courts would ultimately direct the states as to what education is appropriate. Neither assertion is accurate.

In its reply memorandum of law, submitted to the district court in support of its motion to dismiss the complaint (R.A. 332-333), the school distict argued that it was in full compliance with the state plan for the education of deaf children, and that the respondents had not alleged in their complaint that the district had denied Amy Rowley a free appropriate public education. At the hearing on the motion, the attorney for the respondents admitted that the school district was in compliance with the state plan and the regulations implementing it, but argued that such compliance was

irrelevant. The issue was again raised by the school district in its main brief to the court of appeals (p. 15) and in the petition (pp. 21-33).

In its reply brief in the court of appeals (pp. 6-9), the school district argued that education is not a right afforded explicit or implicit protection under the Constitution, that the obligation to provide a free appropriate education to handicapped children is undertaken only as a condition for the receipt of federal aid, and that the obligation is limited to the representations made by the state in the plan submitted to the Secretary of Education. Those assertions were also made in the petition (pp. 29-33). Pennhurst had not been decided at the time the petition was submitted. While the petitioners have utilized the concepts set forth in Pennhurst to explicate their arguments,

these arguments were advanced in the courts below.

Central to the position of the respondents and their amici is the proposition that the language of 20 U.S.C. §1415 (Procedural Safeguards) gives the court to which the appeal has been brought the power to conduct a de novo review, and to devise an appropriate education. The brief submitted by the Association for Retarded Citizens of the United States et al. states that Congress deliberately stripped the states and local school districts of the right to ultimately determine educational programs under the Act because they had "been discredited by their history of ignoring handicapped children." The brief alleges that recourse to a decision maker independent of the education system was seen by Congress as a way to make state and local education agencies "directly

accountable to handicapped children and their parents" (p.21). The position of the respondents and their amici can be summarized as follows: any state which applies for and receives funding under the Act cedes to independent hearing officers and to the courts the right to ultimately determine what is an appropriate education for a handicapped child.

While contending that the procedural safeguards of the Act give the courts absolute discretion to devise appropriate educational programs, the respondents and their amici nonetheless contend that the states do not have unlimited liability. The brief of the Maryland Advocacy Unit for the Developmentally Disabled, Inc. et al. contends that New York State's plan does not list or identify particular services, and that consequently the State has agreed to provide any services found by a court to

be appropriate (pp. 9-10). It argues that, if the State wanted to limit its liability, it should disclose in its plan what it will not do, and appeal any adverse decision over such disclaimer to the appropriate court of appeals (p. 10).

The premise that New York State's plan did not list or identify particular services is false, and the hypothesis that the state plan should list what it will not provide, rather than what it will, is unworkable. As Judge Mansfield stated in his dissenting opinion in the court below (Pet. App. A-11; 632 F.2d 945, 949), the State's plan incorporates sections of New York Education Law, and the regulations of the Commissioner of Education, which detail the specific services to be provided to deaf children. Those services do not include provision of sign language interpreters. While it is true that the actual plan was not

submitted to the courts below, the respondents admitted in open court that the school district was providing the specific services required by the plan. They argued, however, that such compliance was irrelevant in light of the parental demand for a sign language interpreter.

The respondents contend that, since §1415 gives parents "an opportunity to present complaints with respect to . . . the provision of a free appropriate education to such child," (§1415(b)(1)(E)) and allows a court, upon appeal, to "grant such relief as the court determines is appropriate" (§1415 (e)(2)), the state has agreed to place in the hands of the courts the power to allocate unlimited funds, to modify the state plan and its goals, and to substitute whatever program the court deems is appropriate. Judge Broderick stated

this view when he said:

> Aside from the HEW regulation quoted above, it has been left entirely to the courts and hearing officers to give content to the requirements of an "appropriate education." (emphasis supplied) Pet. App. C-11; 483 F.Supp. 528, 534.

That view of the Act is not consistent with the language of §1412 (Eligibility Requirements), §1413 (State Plans), §1414 (Application), §1416 (Withholding of Payments, Judicial Review), and §1418 (Evaluation).

To be eligible for financial assistance, a state must demonstrate that it has a policy which assures all handicapped children the right to a free appropriate public education (§1412(1)); that it has developed a plan which sets forth the policies and procedures which it has undertaken to assure that it has established a goal of providing full educational opportunity to all handicapped children (§1412(2)(A)); and that a free

appropriate public education will be available for all handicapped children within certain age categories by certain dates (§1412(2)(B)).

In developing its plan, the state must set up a procedure by which individuals concerned with the education of handicapped children can comment upon the state's policies, programs and procedures prior to their adoption, at public hearings conducted on adequate notice, at which they have an opportunity for comment. §1412(7).

The plan itself must set forth the policies and procedures designed to assure that the funds will be expended: first, to achieve the goal of helping handicapped children who are receiving no education; next, to assist those with the most severe handicaps, within each disability, who are receiving inadequate education; and finally, to achieve the

goal of providing a free appropriate education for all handicapped children within the state. §1413(a)(11)(12).

Local school districts applying to the state for federal funding must submit similar plans to the state, describing their priorities and goals. §1414(a). If the Secretary has approved the state's plan, the state may approve local applications which it determines are in conformity with the Act. §1414(b). If a local school district is unable or unwilling to meet the conditions of the Act, the state may utilize the funds otherwise allocable to the local school district to provide education and services in a manner it considers appropriate, consistent with the Act. §1414(d).

If the Secretary finds that a state plan is not in conformity with the Act, he may withhold funding or terminate

existing funding. §1416(a). A state may petition the court of appeals for the circuit in which the state is located for review of the Secretary's decision. §1416(b).

The Secretary is required to measure and evaluate the impact of the Act and the effectiveness of state efforts to assure a free appropriate public education, and to report annually to Congress on the number of children who need special education and related services, as well as the number who, within each disability, are receiving a free appropriate public education, and the number who are not. §1418(a).

Under the Act a free appropriate public education is a goal, rather than a federal mandate. The Act contemplates that the scope of a state's program will be the subject of public debate before it is submitted to the Secretary for

approval. §1412(7). It envisions that the debate will address specific efforts directed toward particular classes of handicapped pupils (§1412(3); §1414(a)(1)(C)(ii)), within the scope of the state's resources and priorities.

The Act asks the states to classify their handicapped children by type of handicapping condition, and to plan different programs for such classes, on the basis of whether they are receiving no education, or an inadequate education. It holds out to the states a review procedure by which the Secretary determines whether the plan submitted is in conformity with the Act. It then requires the states and the Secretary to monitor their performance in achieving the goals of the Act.

Taken together, §1412 (Eligibility Requirements), §1413 (State Plans), §1414 (Application), §1416 (Withholding of

Payments; Judicial Review), §1418 (Evaluation), and the regulations governing the submission of the state annual program plan (45 C.F.R. §121a.110 et. seq.) indicate clearly that the method of attaining the goal of a free appropriate public education is a matter of state concern and choice. In making that choice, the state can opt to provide one form of remediation rather than another, i.e., instruction by certified teachers of the deaf for deaf pupils instead of sign language interpreters, and obtain from the Secretary a determination that its plan is in conformity with the requirement that it provide a free appropriate education.

There is nothing in the law or the regulations which suggests, even remotely, that the plan submitted must guarantee to do anything, at whatever cost, in anticipation of a ruling by a

hearing officer or a court pursuant to §1415.

A proper construction of the role of §1415 is the one adopted by the court in McCowen v. Hahn, ____ F.Supp. _____, EHLR 533:131 (N.D. Ill. 1981), i.e., that the power of review is limited by the language of subsection (a) of §1415, which mandates review only of the procedure by which the child has been identified, evaluated, placed, or provided a free appropriate public education. That construction of §1415 will preserve the traditional roles of the state and the local school districts as the primary providers and determiners of educational services.

Petitioners have never alleged that a state plan which does not include a certain service precludes provision of that service, if the state agency or local school district determines that

the service is necessary for a particular child. However, the determination to provide such service must be left to the administrative personnel of the educational agencies, as they are aware of the child's unique needs, are experts in the field of education, and are familiar with local financial burdens. They alone are capable of evaluating the needs of the individual child and the services necessary to meet those needs, and of balancing the needs against budgetary constraints. It is entirely proper for them to determine to provide a service to a particular child, even though it is not contained in the state plan. The same cannot be said for the courts.

The construction urged by the respondents destroys fundamental constitutional distinctions, and removes from the states their traditional and hallowed

authority over the quality and quantity of educational services. Such a removal is not to be accomplished lightly. The Act does not make a plain statement to the effect that, when a state submits a plan to the Secretary, under sections which describe the plan as a goal and which give the state wide latitude in determining what its plan shall contain, the state thereby concedes to hearing officers and courts, under §1415, the right to set aside the plan and to substitute an entirely new plan, regardless of the consequences or the cost. If that is the intent of the Act, it is not clearly articulated on its face. It thus fails to meet the test of knowing acceptance set down for funding statutes under Pennhurst.

2. The definition of free appropriate public education formulated by the district court, and confirmed by the court of appeals, should be overturned.

The Act contains a definition which delineates the parameters of the free appropriate public education to be provided to handicapped pupils, but which is sufficiently general in scope to allow application of the definition to the unique individual needs of each handicapped child. The Act and regulations define free appropriate public education and its components: special education and related services. 20 U.S.C. §1401(18)(16)(17); 45 C.F.R. §121a.4,.14,.13.

If this Court determines that the statutory definition is overly broad or vague, and that a clearer and more precise standard is required in order to gauge whether a free appropriate public education is being provided in a given

instance, the definition formulated by the district court is not an appropriate replacement, as lack of clarity and precision are the very defects from which it suffers.

The district court held that in order to provide a free appropriate public education

> each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. Pet. App. A-C 10; 483 F.Supp. 528, 534.

It then stated that the standard requires

> that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. Pet. App. A-C 13-14; 483 F.Supp. 528, 535.

The test enunciated by the court is impossible of implementation, and fails to provide guidance to state and local educational agencies, as no tests to

measure potential presently exist, and many factors beyond the control of such agencies influence both shortfall and potential. Respondents' amici recognize the unwieldiness and unworkability of the test. In urging adoption of the district court definition, they characterize the test for determining its application as a gloss on the standard which may be rejected by this Court,[1] as measurements and comparisons which are not required for an equal opportunity approach,[2] as a flaw in the formulation,[3] and as dicta which is not necessary for the holding,

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[1]Brief of the United States, p. 14

[2]Brief of the National Association of the Deaf et al., p. 21 N.9

[3]Brief of the American Civil Liberties Union, p. 25 N.6

and which was not incorporated in the Second Circuit's affirmation.[4] The test requires measurements of potential and shortfall, which in practice are impossible. Even if the district court's definition of free appropriate public education is upheld, petitioners submit that the test which the district court required should be invalidated.

Given the impossibility of applying the test, the question then becomes whether the definition itself is so much clearer and more precise than the statutory definition, that this Court should allow a judicial construction to usurp the statutory delineation of a free appropriate public education.

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[4]Brief of the United Cerebral Palsy Association, Inc. et al., p. 15 Note

Even if the measurements mandated by the district court are eliminated, the definition requires evaluation of "full potential" and measurement of the constituent elements of an opportunity to achieve it. Is this, on its face, a clear and precise standard against which the special education and related services provided to a handicapped child can be measured? A review of the briefs submitted by the respondents and their amici demonstrates that the question must be answered in the negative, as the briefs contain quite different interpretations of the definition.

In its brief, the United States argues that the issue is neither relative potential nor relative achievement, but equal access to the educational process (p. 14 N.6). The National Association of the Deaf et al. hold that the

definition requires those items which are necessary to provide handicapped children with an educational opportunity commensurate with that available to the non-handicapped (p. 20). The brief by the American Civil Liberties Union states that the definition requires provision of an educational program which minimizes the effects of the handicapping condition (p. 21, 25 N.6). United Cerebral Palsy Associations, Inc. et al. argue in their brief that commensurate opportunity is a comparative perspective which provides a concrete framework for judicial review of factors such as hours of instruction, delays in placement, curriculum standards and enrichment activities (pp. 16-17). Respondents' brief states that the district court formulated an input standard: an opportunity to achieve,

equivalent to the opportunity provided to other children (p. 6). These interpretations not only differ, they also fail to elucidate the meaning of the definition in any practical way.

The foregoing reveals that the district court's definition, even without the requirements for measurement of shortfall and potential, creates more problems than it solves. If the amici addressing the Court cannot agree on a single interpretation of the definition, how are local and state educational agencies to be guided by it, and how are hearing officers and courts to apply it to unique cases with any consistency? While the statutory definition is a flexible standard which sets forth the scope of the special education and related services to be provided to handicapped children, the district court

definition is a comparative one, which requires measurement of intangibles, such as potential and opportunity to achieve. The inherent difficulties with this comparative definition, and the evaluations which must be made in order to apply it, create great confusion when an attempt is made to use it as a standard. Varying interpretations contained in the briefs of the amici are attempts to clarify the standard. Thus, the district court, rather than improving upon the statutory definition, has appended to it an unnecessary and confusing gloss.

Assuming, arguendo, that this Court reaches a determination that neither the definition of free appropriate public education contained in the Act and regulations, nor the definition devised by the district court, is appropriate, a new definition in keeping with the

legislative intent must be formulated. Respondents and their amici argue that the standard proposed by Judge Mansfield in his dissenting opinion, i.e. self-sufficiency for the handicapped, cannot have been the intent of the legislature, since that goal is applicable only to certain retarded children. In developing that standard, Judge Mansfield stated:

> The legislative history of the Act reveals that Congress was simply concerned with ensuring that handicapped children would become independent, productive citizens rather than that their potentials be compared with those of the non-handicapped. Pet.App. A 16-17; 632 F.2d 945, 952.

Congress did not intend that handicapped children be provided merely with an opportunity to learn to feed and dress themselves. Obviously many handicapped children are capable of doing that before they begin their education. However, neither did Congress intend that local

and state educational agencies provide handicapped children with an opportunity to either maximize their potential or achieve their full potential. According to Judge Mansfield's analysis,

> [t]he language and legislative history of the Act demonstrate that Congress visualized a much more practical objective, i.e., an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her non-handicapped classmates. Pet. App. A-19; 632 F. 2d 945, 953.

State and local educational agencies should not be held accountable for the achievement of the potential of handicapped children, when no such requirement exists for the non-handicapped. Variations in the maturity, abilities and family background of all children make this an impossible goal. All that

should be required is the provision of an adequate education to all children, in a setting which allows them to acquire academic expertise, social skills and moral values necessary to become functioning members of society. The purpose of the Act is to ensure that handicapped children are not denied this requirement; and, given the balance that must be struck between fiscal constraints and provision of services, that financial hardships do not weigh more heavily upon the handicapped than on the so-called "normal" majority.

3. The finding of the district court that Amy Rowley needs a sign language interpreter was clearly erroneous, in that it was not supported by the evidence.

The regulations define deaf, for the purposes of the Act, as:

> A hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance. (emphasis supplied) 45 C.F.R. §121a.5(a) (1).

The district court's conclusion that Amy Rowley requires a sign language interpreter in her mainstream classroom was based on a finding that she understands only 59% of what takes place in class. That finding was not supported by the evidence adduced at trial, and the decision based on that finding should be reversed.

At the hearings before the independent hearing officer and the district court, petitioners introduced detailed,

uncontroverted evidence that Amy Rowley comprehends the academic materials taught in her class, that the physical situation in the classroom aids in maximizing use of her residual hearing and excellent lipreading skills, and that she has excellent rapport with her teachers and peers. J.A. 42-48, 227-228, 231, 239-242, 257-269, 275-276, 278-279, 302. Testimony of people who had observed and worked with Amy in the classroom setting, as well as evidence as to her academic performance and standardized test scores, presented a picture of a child of high-average intelligence who understands the concepts presented in class and whose academic performance is appropriate to her intellectual level. J.A. 277-282; R-T 54; R-A 74, 98; R-E 39-62.

The finding of the district court that Amy Rowley understands only 59% of what transpires in her classroom is

based, not on the evidence of her comprehension of academic materials or understanding of events that take place, but rather on the results of an audiological test which measured her ability to hear discrete sounds in a laboratory setting.[5] By equating the ability to hear only 59% of the sounds presented in an audiological test to the ability to understand only 59% of what transpires in the classroom, the district court made an unwarranted leap, and ignored the evidence.

There is a distinction between hearing sounds and understanding meaning.

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[5]It should be noted that a variety of audiological reports were introduced into evidence. The results ranged from a low of 27%, to a high of 84%. (When the test was given with total communication she scored 100%. However that was not a test of her ability to hear.) Pet. App. C-20; 483 F.Supp. 528, 533.

Although Amy Rowley cannot hear every sound in the classroom, the testimony amply demonstrated that she grasps the meaning of what transpires there. She has excellent lipreading skills, and her good residual hearing in the low frequencies, which enables her to hear the vowel sounds, is supplemented electronically. Body language, facial expressions, and contextual clues all convey meaning, and do not require an ability to hear in order to understand.

The fact that Amy Rowley performs well academically and receives high scores on standardized tests shows that she does in fact understand what transpires in her classroom. Dr. Barbara Ann Kligerman, the audiologist who has tested Amy over the years, testified in district court that there is a distinction between tests for hearing and tests for comprehension, and that school vocabulary tests

are a better measure of understanding and comprehension than are tests which measure hearing. R-T 138-140. Her high test scores demonstrate her comprehension of the information imparted in her class. R-E 39-62.

The district court's determination that Amy was not receiving an appropriate education was derived from inferences drawn from testimony about deaf children in general, without reference to how Amy was actually performing in an academic setting. The determination was clearly erroneous.

The district court constructed a definition of free appropriate public education, and developed a test to determine whether such an education was being provided to handicapped students. The court then determined that, based on the evidence before it, it could not apply

the test to Amy Rowley. The court therefore abandoned the test it had developed. It determined that Amy Rowley required a sign language interpreter, because respondent's witnesses, who had never observed Amy in class, testified that every deaf child fares better in a class with an interpreter. Under §1401 (16), the education that is to be provided to a handicapped student must be designed to meet the unique needs of the individual, rather than the perceived needs of a class of handicapped.

At the district court hearing the petitioners did not introduce evidence as to opposing schools of thought on education of the deaf, as the issue before the court was whether Amy Rowley required an interpreter, not whether total communication is the preferred philosophy of education of the deaf. However, the fact remains that total

communication is not the only method of education espoused by educators of the deaf, and many studies have demonstrated the advantages of other approaches.[6] In Amy's case, provision of an interpreter is unnecessary, as she is performing extremely well in school. Provision of an interpreter could hinder improvement of her well developed lipreading skills, and lead to a decline in the use of her residual hearing. Studies have shown that use of lipreading skills and residual hearing tend to decline in

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[6]See, e.g., Brill, The Mythology of Interpreters for Deaf Elementary Pupils, 33 Deaf American 17 (1981); Nix, Total Communication: A Review of the Studies Offered in Its Support, 77 Volta Rev. 470 (1975); Oral Education Today & Tomorrow (A. Mulholland ed. 1981).

direct proportion to an increasing use of sign language.[7]

The court of appeals found it unnecessary to reach the issue of whether the district court improperly admitted three affidavits post trial, submitted to but not considered by the Commissioner of Education, on the ground that the respondents had met their burden of proof without them. The decision inaccurately attributes the lack of consideration to the independent hearing officer. See footnote 6, Pet. App. A-7, 632 F.2d 945,

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[7]See, e.g., Northcott, Freedom Through Speech: Every Child's Right, 83 Volta Rev. 162 (1981); Carson & Goetzinger, A Study of Learning in Deaf Children, 15 J. Auditory Research 73 (1975); Gensema & Trybus, Communication Patterns and Educational Achievement of Hearing Impaired Students, data from the National Achievement Test Standardization Program for Hearing Impaired Students, Office of Demographic Studies, Gallaudet College (1978).

948. However, the court of appeals based its affirmance on "certain critical evidence," among which were "observations of her in the classroom that [show] Amy misses a substantial part of what goes on in her classroom." Pet.App. A-6; 632 F.2d 945, 947-948. All the evidence, except that contained in the disputed affidavits, was to the contrary.

Judge Mansfield characterized the decision to admit the affidavits post trial as patent error amounting to a denial of due process. He said that Judge Broderick had relied upon the affidavits, and that such reliance formed a critical part of his decision since:

> they constituted the only evidence in favor of the plaintiff's position which was based on observation of Amy. (emphasis supplied) Pet. App. A-23; 632 F.2d 945, 955.

Judge Mansfield pointed out that, since Judge Broderick actually relied on the

affidavits, the court of appeals was in no position to say what his opinion would have been had they not been erroneously admitted and considered by him.

Two of the affiants (Mary Sheie and Nancy Rowley) testified at the hearing before the independent hearing officer, but not about Amy's classroom performance. Nancy Rowley testified in district court, again without reference to Amy's classroom performance. The respondents obviously did not want the evidence in the affidavits subjected to cross-examination.

The court of appeals also included in its recitation of critical evidence the following statement.

> Many sounds are not visible on the lips and communication is impossible when the teacher and students are not facing Amy. Pet. App. A-6; 632 F.2d 945, 947.

The testimony of two witnesses who were subject to cross-examination, and who

each spent a morning with Amy, was clearly and unequivocally to the contrary. J.A. 42, 267-268. They were not cross-examined. There is no testimony in the record for the court's conclusion.

Judge Broderick and the majority of the court of appeals held that Amy did not understand almost 41% of what transpired in her class. They based that determination on general propositions purportedly applicable to all deaf children, and upon affidavits deliberately shielded from cross-examination by the respondents. They ignored uncontradicted testimony on Amy's understanding, and on her academic and social success. Their findings were clearly erroneous and should be reversed.

4. The district court improperly granted injunctive relief extending beyond the school year covered by the individualized education program for which respondents sought judicial review.

Subsection (a)(11) of §1413 (State Plans) requires that a state plan

> provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to §1417 of [the Act].

The annual review triggers the parents' right to challenge any determination made at such annual review pursuant to §1415 (b)(2).

Under the Act, Congress has made the right to bring an action in state or federal court explicitly contingent on the exhaustion of administrative remedies. Akers v. Bolton, ___ F.Supp.___, 3 EHLR 553:225, 234 (D. Kan. 1981).

Under the rules of the New York

Commissioner of Education for appealing the decision of the committee on the handicapped to an independent hearing officer (8 N.Y.C.R.R. §200.5), and for appealing that decision to the Commissioner of Education (8 N.Y.C.R.R. §279), the process can be completed within 95 days, assuming the appellant files on the first available date, and respondent on the last. The maximum time to complete the process is 135 days.

The New York State plan, submitted to and approved by the Secretary, then provides for judicial review of the Commissioner's final determination by means of an Article 78 proceeding (N.Y. C.P.L.R. §7800 et seq. (McKinney's)), which can be brought as soon as the final administrative decision has been received. Under the Act, a party may opt for an immediate appeal to a federal court, the path chosen here.

The 1978-79 school year expired on June 30, 1979, making respondents' appeal moot for that year. The respondents were responsible for the delay in bringing the matter to court. They delayed the impartial hearing for two months in order to submit an additional affidavit, and they waited four months after filing the federal action to move for injunctive relief. See petitioner's main brief, footnotes 2 (p. 10) and 7 (p. 15) for the chronology of events.

The school district's Committee on the Handicapped determined the program for the 1979-80 school year, with no change, prior to August 17, the return date for the motion for a preliminary injunction. If the respondents had pursued their administrative remedies for the 1979-80 school year in an expeditious fashion, they could have appealed to a court by early November.

While the conduct of the petitioners was capable of repetition, it was not capable of evading effective review, except through the inaction of the party seeking that review. The subject matter is not inherently incapable of evading review, and thus does not fall within the exception to the mootness rule. Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911) The district court should have dismissed the case upon the Commissioner's motion. Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975).

CONCLUSION

The New York State plan, which was approved by the Secretary of Education under the Act, does not mandate provision of sign language interpreters for deaf children, and the school district personnel determined that Amy Rowley's unique individual needs do not require one. Respondents' complaint should have been dismissed on that basis. The district court formulated an unnecessary and unworkable definition of free appropriate public education. In spite of the evidence presented by petitioners' witnesses, it erroneously found that Amy Rowley required an interpreter in her mainstream classroom, and ordered provision of interpretive services for the 1979-1980 school year, prior to state administrative review of that year's I.E.P. The Court of Appeals

for the Second Circuit upheld this determination. Its decision was clearly erroneous.

Petitioners respectfully request that this Court reverse the judgment of the Court of Appeals and dismiss the complaint.

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Respectfully submitted,

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